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SIXTH REPORT ON RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

by

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I. INTRODUCTION

1. At its forty-second session, the Commission examined the fourth report of the Special Rapporteur 1/ at its 2176th to 2180th meetings. After discussing draft articles 1-11 as contained in the report, the Commission decided, at its 2180th meeting, to refer them to the Drafting Committee.

2. With one exception, the members of the Commission who spoke in the debate broadly supported the path charted for the topic by the Special Rapporteur in his fourth report and agreed that the Commission should pursue study and consideration of the topic in conformity with the outline approved by the Commission and endorsed by the General Assembly. 2/

3. In accordance with the mandate entrusted to the Commission by the General Assembly, a mandate which it has reaffirmed year after year in its resolutions on the Commission's report, and in conformity with General Assembly resolution 45/41, paragraph 2, adopted on 28 November 1990, the Commission is required to continue its work on this topic.

4. During the deliberations of the Sixth Committee of the General Assembly on the Commission's report, most of the representatives who referred to this topic expressed satisfaction at the progress achieved on it and at the fact that 11 draft articles had been referred to the Drafting Committee. 3/

5. The Special Rapporteur now submits to the Commission his sixth report, conforming to the outline within which the sense and thrust of the topic, together with its substance, were established. This outline was adopted by the Commission in its report to the forty-second session of the General Assembly; this report related to the work of the Commission at its thirty-ninth session, in 1987. 4/

1/ See document A/CN.4/424 and Corr.1.

2/ See summary records A/CN.4/SR.2176 to 2180 of the forty-second session, and Report of the International Law Commission on the work of its forty-second session (A/45/10), paras. 422-427.

3/ See Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-fifth Session, prepared by the Secretariat, (A/CN.4/L.456), paras. 410-417, in relation to the above-mentioned report of the Commission.

4/ See the above-mentioned report, in particular paragraphs 216-219 in Official Records of the General Assembly, Forty-second session, Supplement No. 10 (A/42/10). The outline referred to is as follows:

"1. Privileges and immunities of the organization:

A. Non-fiscal privileges and immunities:

(a) Immunity from legal process;

II. FISCAL IMMUNITIES AND EXEMPTIONS FROM CUSTOMS DUTIES

6. In the present report, first, the fiscal immunities of international organizations, and second, their exemptions from Customs duties will be studied separately.

(b) Inviolability of premises and exercise of control by the organization over those premises;

(c) Immunity of its property and assets from search and from any other form of interference;

(d) Inviolability of its archives and documents;

(e) Privileges and immunities in respect of communication facilities (use of codes and dispatch of correspondence by courier or in bags, etc.);

B. Financial and fiscal privileges:

(a) Exemption from taxes;

(b) Exemption from Customs duties;

(c) Currency controls;

(d) Bank deposits.

"2. Privileges and immunities of officials:

A. Non-fiscal:

(a) Immunity in respect of official acts;

(b) Immunity from national service obligations;

(c) Immunity from immigration restrictions and registration of aliens;

(d) Diplomatic privileges and immunities of executive and other senior officials; and

(e) Repatriation facilities in times of international crisis;

B. Financial and fiscal:

(a) Exemption from taxation of salaries and emoluments;

(b) Exemption from Customs duties.

"3. Privileges and immunities of experts on mission for, or persons having official business with, the organization."

A. Fiscal immunities

7. Legal doctrine has, in general, held that all the various immunities constitute, in substance, no more than a derivation from fiscal immunity, which would thus appear to be the origin in relation to all other immunities. In accordance with this view, fiscal immunity, an extension of immunity of property, in reality constitutes the principle for every immunity. We thus see it in Roman law and in Merovingian law, in France. 5/

8. The reciprocal fiscal immunity which States grant each other in their mutual relations is in fact the counterpart of equality. Pursuant to the principle of sovereignty and equality between States, a State cannot be viewed as being subject to the tax-levying authority of another State. This has been established both by custom in international law and by practice in international relations; it has been ratified by bilateral and multilateral agreements, or even by unilateral decisions of States, at least as regards property intended for State purposes.

9. W.W. Bishop cites article XIX of the Treaty of Friendship concluded on 8 December 1923 between the United States and Germany. This article states: "Lands and buildings situated in the territories of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, national, State, provincial and municipal, other than assessments levied for services or local public improvements by which the premises are benefited". 6/

10. The tax exemption granted to intergovernmental international organizations would also appear to be justified by this same principle of equality between member States. A State may not levy taxes on other States through an international organization, and the host State must not derive unjustified fiscal benefit from the presence of an organization on its territory.

11. The coercive character of taxation explains why an international organization, as an entity independent of the member States of which it is composed, must also avoid the fiscal coercion entailed by taxation.

12. A principle admitted by many legislations in public law holds that the State does not pay taxes to itself, which logically leads to tax exemption.

13. Some writers maintain that the justification for the exemption granted to international organizations must be dissociated from the concept of "organizations of States" and that this justification is based on the aims of public service. According to this view, whereas during the early years of an international organization the personality of States may clearly be seen to

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5/ See Duffar, J., Contribution à l'etude des privilèges et immunités des organisations internationales, p. 267.

6/ Bishop, W.W., Immunity from taxation of foreign State-owned property, A.J.I.L., 1952, p.251 (cited by Duffar, J., op. cit., p.268).

manifest itself in its functioning, this personality gradually tends to become diluted as the organization consolidates itself. Since it is in principle non-profit-making, the activity of a public service is in many national legislations not subject to the tax levied on companies. A budget granted to a public service is used exclusively for the discharge of its mission. Any levy through direct taxation would accordingly be tantamount to distorting the use made of the funds received. 7/

14. As regards States, the expenses of a diplomatic mission, by virtue of being incurred by the sending State, may not be subject to the control of the receiving State and, hence, to any type of fiscal levy imposed by the latter.

15. Generally speaking, diplomatic law does not refer to exemption from direct taxation and a mission's exemption from taxation is defined not on the basis of the fairly vague concept of direct taxes, but in relation to the mission's immovable property.

16. Traditionally, the immovable property of a diplomatic mission, owned by the foreign State, enjoys exemption from any property tax, and from taxes levied at the time of purchase of that property. 8/

17. The Institute of International Law, in its resolution of 1929 (New York session) on diplomatic immunities, established in article 19 that the premises of the mission should be exempt from all dues and taxes save where the premises were not the property of the agent or of the State which the latter represented. 9/

18. Article 23 of the Vienna Convention on Diplomatic Relations confirms and amplifies the practice of States, in stipulating:

> "1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
>
> 2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission".

Similar provisions are to be found in the Vienna Convention on Consular Relations (art. 32) and the Vienna Convention on the Representation of States in their Relations with International Organizations (art. 24).

7/ See, inter alia, Duffar, J., op.cit., p. 269.

8/ See Cahier, P., Le droit diplomatique contemporain, pp. 278 and 55.

9/ See Resolutions of the Institute of International Law, 1873-1956, p. 27, Editions Juridiques et Sociologiques S.A., Basel, 1959. This is also the sense of the Havana Convention of 1928, article 18 (see Sixth American International Conference, Compilation of Treaties, etc., 1889-1936, p. 374, Carnegie Endowment for International Peace, Washington, 1938).

19. In accordance with the Conventions cited, exemption applies both when the State is the owner and when it is only the lessee of the premises of the mission. In other words, now the mission is exempted even when it is merely the lessee, in which case it may lawfully be stipulated that taxes will be defrayed by the lessee, in other words, the mission. 10/ In addition, the mission is exempt from payment of the transfer taxes which private individuals are required to pay in property transactions.

20. Clearly, the exemption of property, in relation to direct taxes, constitutes the most important of the exemptions granted to diplomatic missions. 11/

21. As we have seen, article 23 of the Vienna Convention on Diplomatic Relations exempts the sending State and the head of the mission from "all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased".

22. The International Law Commission, in its commentary on this provision in the draft articles on diplomatic relations, stated that "The provision does not apply to the case where the owner of leased premises specifies in the lease that such taxes are to be defrayed by the mission. This liability becomes part of the consideration given for the use of the premises and usually involves, in effect, not the payment of taxes as such, but an increase in the rental payable". 12/ This reasoning may also be applied to intergovernmental international organizations.

23. As far as the international organizations are concerned, the Convention on the Privileges and Immunities of the United Nations of 1946 (art. II, sect. 7) and the Convention on the Privileges and Immunities of the Specialized Agencies of 1947 (art. III, sect. 9) enable the international organizations to which they apply to benefit from much broader exemption, since they refer to all direct taxes.

24. Article III, section 9, of the Convention on the Privileges and Immunities of the Specialized Agencies establishes that:

> "The specialized agencies, their assets, income and other property shall be:
>
> (a) Exempt from all direct taxes; it is understood, however, that the specialized agencies will not claim exemption from taxes which are, in fact, no more than charges for public utility services;"

10/ See Yearbook of the International Law Commission, 1958, vol.II, p. 96.

11/ See "Practice followed by Member States in exempting diplomatic missions from real estate taxes", United Nations, General Assembly, Committee on Relations with the Host Country, A/AG.154/WG.1/L.2, 16 April 1974, Add.2 of 11 June 1974, Corr.1 and 2 of August 1974, Add.4 of 5 February 1975.

12/ See Yearbook of the International Law Commission, 1958, vol.II, p. 95.

25. Article II, section 7, of the Convention on the Privileges and Immunities of the United Nations, article 7 (a) of the General Agreement on Privileges and Immunities of the Council of Europe of 1949, and article 5 (a) of the Agreement on Privileges and Immunities of the Organization of American States 13/, supplemented by the Bilateral Agreement between the Council of OAS and the Government of the United States of America, by which OAS will avail itself of the provisions contained in the International Organizations Immunities Act, 14/ are drafted in similar terms.

26. All the legal instruments we have mentioned speak of exemption from any direct taxation, with the proviso, however, that no exemption may be claimed from taxes which are, in fact, charges for public services or public utility services.

27. Moreover, in an important series of bilateral agreements concluded between international organizations and a number of States, the international organizations are, in general, exempted from all direct taxes. The agreements include: Switzerland-ILO, art.10; 15/ Mexico-ILO, art. 4 (a); 16/ Canada-ICAO, sect. 6 (a); Italy-FAO, sect. 19 (a); Chile-FAO, sect. 13 (a); 17/ Egypt-FAO, sect. 13 (a); 18/ Thailand-FAO, sect. 15 (a); 19/ France-UNESCO, art. 15; 20/ Switzerland-WHO, art. 10. 21/.

28. States usually establish a distinction between direct taxes, from which international organizations are exempted, and indirect taxes or charges included in the prices of movable and immovable property, on which a rebate or refund may not be required from member States except in the case of large or substantial purchases, where it is possible to take appropriate administrative measures. This restriction on the principle of exemption is reasonable and justified. Such taxes and charges are usually incorporated in the price paid and are collected by the State through a third party, the trader, and not from the organization as such.

13/ See Anuario Jurídico Interamericano, 1949, Pan-American Union, Washington, 1950, pp. 348-349.

14/ Public Law 291 (59 STAT 699; 22 U.S.C. SEC 288), ibid., pp. 353 et seq.

15/ See Legislative Texts and Treaty Provisions, vol. II, p. 139.

16/ Ibid., p. 152.

17/ Ibid., p. 209.

18/ Ibid., p. 215.

19/ Ibid., p. 224.

20/ Ibid., p. 244.

21/ Ibid., p. 256.

29. The terms "large purchases" or "substantial purchases" are somewhat imprecise and may give rise to various interpretations. However, in view of the difficulties involved in making the refund, from the administrative viewpoint they enable Governments to require organizations to justify their requests for a refund. In any case, a rebate must be granted on any charge on transfers of property acquired by an international organization for its official activities.

30. Obviously, in some cases it may be difficult to define what should be considered an official activity of an international organization. The European Committee on Legal Cooperation has proposed that an official activity should be considered as one relating to the realization of the purposes of the international organization. 22/ Such a definition makes it possible to exclude certain secondary activities by an international organization, such as the operation of a restaurant, a bar or any other commercial establishment. The Swiss Government, for instance, exempts international organizations from taxes only on buildings of which they are the owner and which are occupied by their services. 23/

31. Clearly, in a case where an international organization engages in a commercial activity, the granting of tax privileges does not apply.

32. The definition of direct taxation is not identical in all national legislations. It varies from one country to another. There is no uniform criterion in that regard. That is why the Secretary-General of the United Nations, in an exchange of notes with a Member State, maintained that "The characterization given to a tax in a particular municipal law system cannot be controlling in the application of the provisions of the Convention on the Privileges and Immunities of the United Nations which must be interpreted uniformly in respect of all Member States. Otherwise there would be inequality of treatment between Members." 24/

33. The distinction between direct taxes and other taxes, however, does not in practice appear to give rise to major difficulties, as the European Committee on Legal Cooperation noted in its aforementioned report on privileges and immunities, except in rare circumstances, which should be resolved on a case-by-case basis. 25/

34. The question also gave rise to a memorandum prepared in 1953 by the Office of Legal Affairs concerning the immunity of the United Nations in respect of its ownership and occupation of the Headquarters District.

22/ See Privilèges et Immunités des Organisations Internationales, Rapport Explicatif Council of Europe, Strasbourg, 1970, para. 61, p. 32.

23/ See Agreement between Switzerland and ILO, cited supra, footnote 15.

24/ See Yearbook of the International Law Commission, 1967, vol. II, para. 152, p. 243, and similarly a memorandum by the United Nations Legal Counsel, United Nations Juridical Yearbook, 1972, p. 165.

25/ Op. cit. supra, footnote 22, para. 60, p. 32.

35. The reasoning of the Office of Legal Affairs was based primarily on Article 105 of the Charter of the United Nations, a multilateral treaty concluded by Member States which, in the words of article 6, clause 2, of the United States Constitution "is the supreme Law of the Land ... anything in the Constitution or Laws of any State to the contrary notwithstanding". The Office of Legal Affairs reached the conclusion that "The United Nations Charter, as part of the supreme law of the land, confers upon the United Nations the immunities necessary for the fulfilment of its purposes, without the requirement of any State legislation; that these immunities include exemption from real property taxes and that the tax exemption became operative from the effective date of the Charter, without regard to the taxable status date under ordinary local practice". 26/

36. Few controversies appear to have arisen concerning the immunity of the specialized agencies and IAEA from direct taxes, and when such controversies have arisen, they have normally been resolved satisfactorily. 27/

37. As provided for in the Convention on the Privileges and Immunities of the Specialized Agencies, the latter pay "charges for public utility services". Questions have arisen regarding the interpretation of that term. In most of these cases, a satisfactory agreement has been reached and the organization concerned has obtained immunity. 28/

38. The Legal Counsel of the United Nations has on several occasions had to negotiate with the competent State authorities on the interpretation of the rules of exemption, eventually reaching a satisfactory solution in the great majority of cases. 29/

39. With regard to taxes on United Nations financial assets, for example, the Legal Counsel of the United Nations wrote, on 11 July 1977, to the Permanent Representative of the United States to the United Nations about the recognition on the part of the competent United States authorities of the exemption of the United Nations, inter alia under the Convention on the Privileges and the Immunities of the United Nations, from the stock-transfer tax levied in one of the States of the Union in relevant transfers executed on behalf of all United Nations assets, in particular the United Nations Joint Staff Pension Fund.

26/ Yearbook of the International Law Commission, 1967, vol. II, para. 167.

27/ See The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities (A/CN.4/L.383, Add. 2), pp. 25-27, and A/CN.4/L.118, Add. 1 and 2, in Yearbook of the International Law Commission, 1967, vol. II, pp. 280-284.

28/ Ibid, p. 26.

29/ See Yearbook of the International Law Commission, 1967, vol. II, pp. 241-248.

40. In his letter, the Legal Counsel concluded that it was the position of the United Nations that the practice of the State concerned must conform to the international obligations of your country (the United States) and that the stock-transfer tax law must be interpreted in that light. 30/

41. In 1988, the United States Mission to the United Nations informed the Legal Counsel that, following a study of the matter by the New York State Commission on Taxation and Finance, a ruling had been made to the effect that the United Nations Joint Staff Pension Fund would be exempt from the New York stock-transfer tax. 31/

42. The report of the Committee of the San Francisco Conference responsible for the drafting of Article 105 pointed out that "if there is one principle certain it is that no Member State may hinder in any way the working of the Organization or take any measure the effect of which might be to increase its burdens financial or otherwise". 32/

43. The Agreement signed between the United Nations and Switzerland contains the following clause:

> "Section 5. The United Nations, its assets, income and other property shall be:
>
> (a) Exempt from all direct and indirect taxes whether federal, cantonal or communal. It is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services;
>
> (b) Exempt from the droit de timbre on coupons instituted by the Swiss Federal Law of 25 June 1921, and from the impôt anticipé introduced by the Federal Council decree, 1 September 1943, and supplemented by the Federal Council decree of 31 October 1944. The exemption shall be effected by the repayment to the United Nations of the amount of tax levied on its assets."

44. In conformity with the position maintained by the United Nations Office of Legal Affairs, in view of the fact that the General Convention was drawn up for uniform application in all Member States of the United Nations, the meaning to be given to the term "direct taxes" cannot depend on the particular meaning given to that expression by the fiscal laws of a particular State. Thus, whilst the terms "direct" and "indirect" taxes are interpreted differently in the various national legal systems of Member States, according to the tax system or administration adopted, the meaning to be given to those terms in relation to the application of the General Convention must be found by reference to the nature of that instrument and to the incidence of the tax

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30/ See The Practice ... (A/CN.4/L.383/Add.1), pp. 36-37.

31/ Ibid., para. 27, p. 37.

32/ See Documents of the United Nations Conference on International Organization, San Francisco, 1945, vol. XIII, pp. 705 and 780.

in question, that is to say, according to the party upon whom the burden of payment directly falls. Moreover, in interpreting the Convention, the United Nations and its Members must be guided by the overlying principles of the Charter, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. In accordance with that provision, no Member State can hinder the working of the Organization or take any measure which might increase its financial or other burdens; this opinion was expressed at the United Nations Conference on International Organization, San Francisco, 1945. 33/ Under article IV of the Convention, therefore, the Organization is relieved of the burden of all direct taxes, and is to be granted the remission or return of indirect taxes where the amount is important enough to make this administratively possible. 34/

45. The Convention on the Privileges and Immunities of the Specialized Agencies establishes the same principle. Apparently, in practice, no major difficulties have occurred in respect of its implementation. 35/

46. Some headquarters agreements refer specifically to exemption from taxation on buildings of which the international organization is the owner and which are occupied by its services. Unquestionably, the most detailed of these agreements is that signed by Italy and FAO, which exonerates the organization from any form of direct taxation, particularly the tax on movable property (imposta sui redditi di ricchezza mobile), the land income tax (imposta sui redditi dei terreni), the tax on income from buildings (imposta sui redditi dei fabbricati), the capital levy (imposta sul patrimonio) and all local surtaxes (sovra imposte locali). 36/

47. Some national legislations make a distinction between charges and taxes. A tax, economically speaking, is the payment devolving upon each citizen to enable the expenditures of the State to be covered and, administratively, it is an official act.

48. In contrast, a charge is a payment for a service rendered. In the first place it is the cost of a service for which payment has to be made. In some cases the charge for the service must be made by semi-administrative measures, but such a procedure does not change the nature of the charge. That is why the various provisions contained in the Convention on the Privileges and Immunities of the United Nations (art. II, sect. 7) and the Convention on the Privileges and Immunities of the Specialized Agencies (art. III, sect. 9 (a)), in establishing exemption from direct or indirect taxes make a specific

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33/ See supra, para. 42, footnote 32.

34/ See Yearbook of the International Law Commission, 1967, vol. II, para. 144, p. 241.

35/ See Yearbook of the International Law Commission, 1967, vol. II, paras. 53 and 55, p. 306.

36/ Ibid., para. 55, and Legislative Texts and Treaty Provisions, vol. II, sect. 19 (a), pp. 192-193.

reservation, however, in respect of the charges for "public utility services" or "general utility services", which any international organization availing itself of such services is required to pay.

49. Similar provisions are found in the General Agreement on Privileges and Immunities of the Council of Europe (art. 7 (a)); in the Vienna Conventions on Diplomatic Relations (arts. 23 and 34), on Consular Relations (arts. 32 and 49 (a)), Special Missions (art. 24), and the Representation of States in their Relations with International Organizations of a Universal Character (art. 24).

50. In some national legislations, this distinction, established long ago by doctrine between a tax and a charge, has been complicated by the emergence of further divisions and classifications. With respect to international organizations, the Swiss-League of Nations Modus Vivendi of 1926, in article VIII, established the criteria for determining the meaning to be given to a charge. That article states:

> "Charges are understood to mean - irrespective of the term used in the relevant regulations - solely those taxes relating to a special and specific service performed by the administration for the person who is paying, as well as those taxes that are paid to defray expenditures particularly necessitated by an act of a taxpayer". 37/

51. We may conclude from the above that intergovernmental international organizations should, and do enjoy, in the same way as States and the diplomatic missions that represent them, the necessary and indispensable fiscal immunities for the effective performance of their official functions.

B. Exemptions from Customs duties

52. For the purposes of the effective performance of their official functions, intergovernmental international organizations must, as we have seen, enjoy the greatest possible independence in relation to the States of which they are composed. This independence must not be impeded in any way. Accordingly, the principle of the free movement of the articles and capital of international organizations appears to have been accepted and constitutes one of the basic elements for preserving and guaranteeing this independence.

53. It therefore appears logical that all legal texts, whether they be bilateral agreements, multilateral conventions or unilateral decisions, and the practice of States in this matter should establish the principle of the freedom of movement of the articles, publications and capital of international organizations.

54. As an intergovernmental international organization is a creation of the States of which it is composed and which are equal as between each other, these States must place themselves on an equal footing vis-à-vis the organization of which they are members. It would not be acceptable for a State to derive unjustified fiscal benefit from the funds placed at the disposal of an international organization.

37/ See Legislative Texts and Treaty Provisions, vol. II, p. 135.

55. Article II, section 7, of the Convention on the Privileges and Immunities of the United Nations stipulates:

"The United Nations, its assets, income and other property shall be:

(a) ...

(b) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country".

56. Similar provisions are contained in article III, section 9 (b), of the Convention on the Privileges and Immunities of the Specialized Agencies, article 7 (b) of the General Agreement on the Privileges and Immunities of the Council of Europe, and article 4 of the Protocol on the Privileges and Immunities of the European Communities. Reference may also be made, inter alia, to section 5 (c) of the agreement between Switzerland and the United Nations of 1946, 38/ section 10 (b) of the agreement between Chile and ECLA, 39/ section 8 (b) of the agreement between Thailand and ECAFE, 40/ article 1 of the agreement between Switzerland and ILO, 41/ section 6 (b) of the agreement between Canada and ICAO, 42/ and section 19 (c) of the agreement between FAO and Italy. 43/

57. Many of these agreements establish the same privileges for the publications of the international organizations concerned, as we have seen previously in our fifth report. 44/

58. However, although the free movement of the articles of international organizations is fundamental and necessary for the fulfilment of the purposes for which they have been established, States naturally have the right to protect themselves against abuse or any erroneous interpretation of the principle which may allow the true aim of the principle to be distorted.

38/ See Legislative Texts and Treaty Provisions, vol. I, p. 198.

39/ Ibid., p. 219.

40/ Ibid., p. 226.

41/ Ibid., vol. II, p. 144.

42/ Ibid., p. 163.

43/ Ibid., p. 193.

44/ See document A/CN.4/438 and Corr.1 (English, Russian and Spanish only), paragraphs 55 and 56.

59. Even though most of the agreements cited do not include express provisions concerning control by the State, there are differences in their wording which impose certain limitations on application of the principle of exemption. Thus, for example, in the agreement between Italy and FAO, it is stipulated that the maximum number of vehicles that FAO may import will be 12 (sect. 19 (c)). 45/ On the other hand, the agreement between Austria and IAEA establishes no limitation with regard to this question (sect. 22 (e)). 46/ Other agreements are even broader and list a number of undetermined articles for which exemption is granted. Thus, article III of the agreement between the Government of Egypt and UNRWA provides that the "goods, stores, produce and equipment, including petroleum products" shall be exempt. 47/

60. It is thus necessary that a balance should be struck between the two principles: that of the free movement of the articles which international organizations import or export for their official use, and the right of the State to protect its interests and security. In the last agreement cited in the previous paragraph it is stipulated that:

> "(2) Subject to measures connected with security and public order the aforementioned goods, stores, produce and equipment will be exempted from Customs examination and inspection. This exemption can be withdrawn if the Customs authorities find out that it is being abused". 48/

61. Before the adoption, in 1961, of the Vienna Convention on Diplomatic Relations, the régime applied to the international organizations in this area was, in most cases, similar to that applied to diplomatic missions. Thus, for example, in accordance with the agreement concluded with the United States, the Organization of American States (OAS) benefits from the same Customs privileges as those granted to foreign Governments, under the terms of the International Organizations Immunities Act. Title I, section 2 (d), of this Act stipulates:

> "Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments". 49/

45/ Legislative Texts and Treaty Provisions, vol. II, p. 193.

46/ Ibid., p. 333.

47/ See Yearbook of the International Law Commission, 1967, vol. II, paragraph 177, p. 258.

48/ Ibid.

49/ See Public Law 291 (59 STAT. 669 (1945), 22 U.S.C. SEC. 288 (1952)) in the Anuario Juridico Interamericano, 1949, Pan-American Union, Washington D.C., 1950, p.359.

62. When ILO had to move to Canada as a result of the Second World War, the Canadian Under-Secretary of State for External Affairs decided, and informed ILO in an official note, that "as regards matters of customs and customs duties, the position of the International Labour Office in Canada is analogous to that of a foreign legation". 50/

63. However, since the adoption of the Vienna Convention on Diplomatic Relations, the situation has changed, there having been a shift in favour of the international organizations. The Customs privileges granted to these organizations appear to be broader than those granted to diplomatic missions. Article 36, paragraph 1, of the Vienna Convention establishes a limitation on exemption, stipulating that: "The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of the mission;".

64. A similar limitation is established in the Vienna Convention on Consular Relations (art. 50) and in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (art. 35).

65. Furthermore, States may, under the principle of reciprocity, impose conditions on the application, and restrict the scope, of the privilege granted. The commentaries of the International Law Commission of the United Nations also refer to the possibility open to States to restrict the exemption granted to diplomatic missions. 51/

66. This type of restriction is not to be found in the relevant texts concerning Customs exemptions for international organizations. The prevailing view is that the free movement of articles belonging to international organizations must not be obstructed by levying import or export Customs duties or by measures of an economic character or by administrative measures for the prohibition or restriction of imports or exports - measures that would run counter to the principle of the equality of States and of the freedom of action of international organizations. 52/

67. The total exemption régime which is applied to international organizations is, however, accompanied by certain procedural rules which, although not intended to establish absolute control on the part of the State, enable it at least to acquaint itself with the imports made by international organizations and hence foresee or minimize possible abuses. Many States

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50/ See International Labour Office, Official Bulletin, vol. XXV, 1 April 1944, pp. 74-78.

51/ See Ph. Cahier, Le droit diplomatique contemporain, p. 192.

52/ See Yearbook of the International Law Commission, 1967, vol. II, para. 184, p. 250.

require both diplomatic missions and international organizations to make a written application for exemption "in accordance with diplomatic privileges", indicating the nature, value, weight, quantity, origin, etc., of the items involved, together with a declaration issued by the head of mission or director or secretary-general of the international organization that the goods or articles concerned are intended for official use.

68. Some States require, in addition, a Customs declaration to be presented at the time of importation. All the same, notwithstanding these formalities which are of little consequence in practice, the privilege does exempt the international organizations from the obligation to request an authorization, licence or visa or to abide by quantitative limitations or quotas. 53/

69. This very broad exemption in both fiscal and Customs matters is nevertheless subject, under all the conventions and agreements that have been mentioned, to a very clear limitation by the formula "for official use". In other words, the articles imported duty-free in accordance with the privileges granted to international organizations cannot be used for purposes other than the needs of the international organization for conducting the activities intended to achieve the purposes for which it was created. All this is in conformity with the logic of the system since; otherwise, the equality of all before the general Customs régime would be violated. 54/

70. It will be readily appreciated that difficulties can arise in practice because, while the texts contained in the relevant legal instruments employ the expression "official use", they do not define it. Nevertheless, no unduly complex problems appear to have arisen in formulating a definition, despite the existence of sensitive sectors such as food products, alcohol, tobacco and gasoline. States, which are jealous of their fiscal and Customs prerogatives, have a tendency to limit to a maximum the functional needs of international organizations in these sectors (ibid.).

71. Canada, by an Order-in-Council adopted on 4 April 1952, defined the expression "official use" as follows:

> "'Official use' means use to advance the objects of the United Nations and not enuring to the financial benefit of the importer or any other individual". 55/

72. In an opinion from the Attorney-General of the State of New York, handed down in 1946, on the subject of the duty-free importation of alcoholic beverages intended for official receptions of the United Nations, the Attorney-General referred to Public Law 291 which, as we have already indicated, equates the privileges of international organizations with those of foreign Governments. The Attorney-General stated that "Restricting this

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53/ Ibid., paras. 206 and 207, pp. 253 et seq.

54/ See The practice of the United Nations, ..., document A/CN.4/L.383/Add.2, section 15, paras. 77-78, p. 192.

55/ Legislative Texts and Treaty Provisions, vol. I, p. 14.

ruling to imports by the United Nations itself, to be used only for purposes of its own official hospitality, it is my opinion that the State Liquor Authority should recognize the rights conferred by Public Law 291 of the United States Congress, and permit the delivery of such liquor to the United Nations, upon request by the United Nations specifying the amount and nature of the shipment". 56/

73. The Legal Counsel of the United Nations gave an opinion on the same quetion in 1959 in connection with the right of directors of United Nations information centres to import alcoholic beverages duty-free. "Imports of liquor for official receptions" said the Legal Counsel, "should, by the terms of Section 7 (b) of the Convention on the Privileges and Immunities of the United Nations, be exempt from Customs duties. This applies also to gasoline, whenever it is 'for official use'". 57/

74. Both the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies expressly provide that "It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country" (art. II, sect. 7 (b) and art. III, sect. 9 (b) respectively).

75. It is quite obvious that, if the articles imported under exemption are sold, they cease to have the character of articles "for official use" by the organization, which must therefore pay Customs duty in proportion to the residual value of the article and in accordance with the legal provisions and regulations of the State into which it was imported, or in accordance with the modalities agreed between that State and the organization. In the event of sale of the article to another international organization equally entitled to privileges, the requirement to pay Customs duty does not, of course, apply. 58/

76. The text of some legal instruments speaks not only of sales but also of gifts such as, for example, the European Iron and Steel Community Protocol, which refers to any disposal whether or not in return for payment (art. 4).

77. The United Nations Office of Legal Affairs, in an opinion given to the Legal Adviser of a United Nations subsidiary organ in 1964, specified the conditions which must govern the sale of articles imported duty-free, as follows:

> "While conditions for sale must be agreed with the host country, it was not intended that such conditions should be unilaterally and arbitrarily established but that they should be negotiated with the

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56/ Yearbook of the International Law Commission, 1967, vol. II, para. 178, p. 249.

57/ Ibid., para. 179, p. 249 and paras. 175-184, pp. 248-250.

58/ See The practice of the United Nations ..., document A/CN.4/L.383/Add.2, paras. 84-87.

purpose of protecting the legitimate interests of both parties, that is, to ensure the host country against the abuse of import privileges and to ensure the United Nations and its staff effective use of such privileges for the purposes for which they were intended". 59/

78. International organizations thus enjoy Customs exemption for articles imported or exported for their official use. The exemption does not apply to charges for storage, cartage or similar services. Moreover, the State into whose territory the articles are imported duty-free by the international organization has the right to impose conditions regarding the disposal, whether or not in return for payment, of these articles in its territory. It is likewise entitled to exercise a measure of control over such imports and exports for the purpose of preventing abuse or interpretations which may adversely affect the application of the principle of free movement of the articles of international organizations and of protecting its interests and its security.

III. DRAFT ARTICLES 18 TO 22

79. In accordance with the observation in the present report, the Special Rapporteur proposes the following draft articles as Part V of the draft articles, on the fiscal immunities and exemptions from Customs duties of intergovernmental international organizations of a universal character.

Part V.

Fiscal immunities and Exemptions from Customs duties

Article 18

International organizations, their assets, income and other property intended for their official activities shall be exempt from all direct taxes; it is understood, however, that international organizations will not claim exemptions from taxes which are, in fact, no more than payment for public utility services.

Article 19

1. International organizations shall be exempt from all national, regional or municipal dues and taxes on the premises of the organization, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the international organization.

59/ See Yearbook of the International Law Commission, 1967, vol. II, para. 189, p. 260. See also The practice of the United Nations ..., document A/CN.4/L.383/Add.2, paras. 84-87.

Article 20

International organizations, their assets, income and other property shall, in accordance with the laws and regulations promulgated by the host State, be exempt from:

(a) All kinds of Customs duties, taxes and related charges, other than charges for storage, cartage and similar services, as well as from import and export prohibitions and restrictions with respect to articles imported or exported by international organizations for their official use; it is understood, however, that articles imported under such exemption may not be disposed of, whether or not in return for payment, in the country into which they have been imported, except under conditions agreed with the Government of that country;

(b) Customs duties and prohibitions and restrictions with respect to the import and export of their publications intended for official use.

Article 21

1. International organizations shall not, in principle, claim exemption from consumer taxes or sales taxes on movable and immovable property that are incorporated in the price to be paid.

2. Notwithstanding the provisions of the foregoing paragraph, when international organizations make, for their official use, large purchases of goods on which such duties and taxes have been, or may be, imposed, States parties (to the present Convention) shall, wherever possible, adopt the necessary administrative provisions for the remission or refund of the amount corresponding to such duties or taxes.

Article 22

For the purposes of the foregoing articles, the terms "official activity" or "official use" shall mean those relating to the accomplishment of the purposes of the international organization.